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In The

# Supreme Court of the United States

October Term, 1995

THIYAGARAJAH ADHIYAPPA,

*Petitioner,*

*vs.*

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did this Court, in *INS v. Elias-Zacarias*, require an applicant for asylum "on account of . . . political opinion" to demonstrate that the persecutor's actions would be motivated *exclusively* by the applicant's political opinion, and not to any degree by the activities which the applicant has engaged in to oppose the persecutor, "even when those activities may be in part motivated by political opinion?"

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Petitioner, Thiyagarajah Adhiyappa, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit issued on June 28, 1995.

## OPINIONS BELOW

Mr. Adhiyappa, the Petitioner, was a college lecturer in Sri Lanka. He was forced to flee his native country in order to escape persecution by the Tamil separatist guerrilla organizations he opposed. In 1989, the Immigration and Naturalization Service ("INS"), the Respondent, commenced deportation proceedings against Mr. Adhiyappa pursuant to 8 U.S.C. § 1251(a)(4). Mr. Adhiyappa conceded deportability, but requested relief in the form of asylum pursuant to 8 U.S.C. § 1253(a), and withholding of deportation pursuant to 8 U.S.C. § 1253(h).

On December 11, 1989, the Immigration Judge denied Mr. Adhiyappa's applications for asylum and withholding of deportation, finding that while Mr. Adhiyappa did have a political opinion of opposition to the separatists, he had not demonstrated that the guerrillas would still be interested in him or that they would be able to take action against him throughout Sri Lanka. (Appendix D) On February 8, 1994, the Board of Immigration Appeals ("The Board") dismissed Mr. Adhiyappa's appeal of the Immigration Judge's decision and dismissed his motion to remand the case to the Immigration Judge for consideration of new evidence of the Tamil separatist guerrillas' actions against their opponents throughout Sri Lanka and elsewhere. (Appendix C) The Board's decision was based solely upon its determination that the guerrillas' persecution of Mr. Adhiyappa would not be "on account of . . . political opinion." On June 28, 1995, in a split decision, a panel of the United States Court of Appeals for the Sixth Circuit issued a decision affirming the Board. *Adhiyappa v. INS*, 58 F.3d 261 (6th Cir. 1995). (Appendix B). On September 13, 1995, the Court of Appeals entered an order denying Mr. Adhiyappa's Petition for Rehearing and Suggestion for Review En Banc. (Appendix A).

## STATEMENT OF JURISDICTION

On June 28, 1995, the United States Court of Appeals for the Sixth Circuit entered its decision affirming the decision of the Board of Immigration Appeals.

Petitioner brought a Petition for Rehearing and Suggestion for Review En Banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure. The Order denying the Petition was entered on September 13, 1995. This Petition for Writ of Certiorari is timely filed within ninety days of the denial of the Petition for Reconsideration. This Court's jurisdiction to review, on a writ of certiorari, the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the Board of Immigration Appeals is conferred by 28 U.S.C. § 1254.

## STATUTES INVOLVED

8 U.S.C. § 1158(a) provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1101(a)(42) provides in pertinent part:

> The term "refugee" means (A) any person

> who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . .

## STATEMENT OF THE CASE

### A. Statement of Pertinent Facts

Sri Lanka is a small island nation approximately 270 miles from north to south and approximately 140 miles from east to west. Formerly known as Ceylon, it is just off India's southeast coast. Approximately 74 percent of the population is Sinhalese; 12.5 percent is Sri Lankan Tamils, who migrated to Sri Lanka from southern India many centuries ago; 7 percent is Muslim; and 5.5 percent is Indian Tamils, who were recently brought there by the British to work the tea plantations in the central part of the country. Mr. Adhiyappa is an Indian Tamil.

Since its independence from Britain in 1948, the Sinhalese have been in power in Sri Lanka. Sinhalese has been made Sri Lanka's official language and Buddhism its religion. Sinhalese receive preference in hiring for the civil service and university admissions. Indian Tamils are both exploited and ignored; they are the untouchables of Sri Lanka.

Because of his ethnic background as an Indian Tamil, Mr. Adhiyappa was a victim of his country's ethnic violence since his

early childhood. Violence against Indian Tamils was so predictable and widespread that for more than 25 years Mr. Adhiyappa's family maintained a secret hole in the ground beneath their house, to protect themselves from attacks by Sinhalese. Mr. Adhiyappa still recalls hiding in the hole as a child. During one set of "communal riots" by Sinhalese against Tamils, in retribution for Sri Lankan Tamil attacks against Sinhalese government troops, Mr. Adhiyappa was assaulted and his sister was raped by Sinhalese in front of him and his father.

Beginning in the late 1960's, a secret Sinhalese political movement was established, known as Janatha Vinukti Peramuna (JVP) or People's Liberation Front. The JVP was unsatisfied with the national government's efforts to address Sinhalese unemployment and the country's ethnic problems. Shortly after it was organized, JVP began an armed struggle to, among other things, eradicate the Tamils. At least through 1989, JVP had remained very powerful and had continued to sponsor communal violence against Tamils.

To appease JVP, in 1971 the national government established a new constitution which favors the Sinhalese in education and employment opportunities. Since then, tensions between the Sinhalese and Tamils have grown steadily worse; the Indian Tamils have been caught in the middle.

The 1971 constitution convinced the Sri Lankan Tamils that the only way to redress their grievances was to create an independent state, to be called "Tamil Eelam." The Tamil state would encompass the northern and eastern regions of the island; it would include approximately one third of the country. The most successful Tamil guerrilla group is the Liberation Tigers of Tamil Eelam (LTTE) led by Mr. Velluppillai Pirabhakaran. Its followers are some of the most ruthless guerrilla fighters in the world. They are known for carrying cyanide capsules around their necks in order to commit suicide upon arrest. They are also

famous for wrapping explosives around their bodies for suicide bombings.

Indian Tamils oppose the creation of a Tamil state. For many years, Mr. Adhiyappa and his family have been members of the Ceylon Workers' Congress (CWC), which opposes the creation of a separate Tamil state. Mr. Adhiyappa vehemently opposes the creation of a separate Tamil nation. He believes that he and the other Indian Tamils would be at a greater risk in a more monolithic society, which the balkanization of Sri Lanka would bring. Mr. Adhiyappa's political ideas, which were based upon his upbringing and his personal experience, were later reinforced by his education.

Mr. Adhiyappa earned a degree in geography from the University of Peradeniya. In September 1980, he obtained a position as a geography instructor at Jaffna University in northern Sri Lanka. While he was an instructor, Mr. Adhiyappa spoke out against the separatist movement, both inside and outside the classroom. He advised students not to join the guerrillas, which were operating on and around the campus. In March 1981, the university chancellor, having become aware of Mr. Adhiyappa's vocal opposition to the guerrilla movement, offered Mr. Adhiyappa an additional position as an assistant student advisor. He accepted the position. His additional duties included advising freshmen students, and observing Sri Lankan Tamil student groups on the campus in an attempt to prevent terrorist activities. As he had done previously, he encouraged students not to become involved in Sri Lankan Tamil terrorist organizations.He also agreed to cooperate with Sri Lankan security forces' investigations of the guerrillas on campus. He performed this role until 1983.

Mr. Adhiyappa strongly opposed the creation of a separate state. He articulated his position to Tamil students and tried to

persuade them not to become involved with the terrorist organizations. As a teacher of geo-politics, he was perceived to have an influence on the students. Mr. Adhiyappa has testified, "All this time I have been informing student's [sic] names and advising them not to get involved in that terrorist activities especially the LTTE [sic]."

The Immigration Judge asked Mr. Adhiyappa, "Was your informant role participated [sic] by your own belief or because of money? To keep your job?" Mr. Adhiyappa answered, "My own belief because I . . . since I came from the south, they also (discernible) of CWC. CWC strongly stands for united Sri Lanka. And I know Jaffna, I did not understand the political situation in the area and so forth. And I simply started to perform my duties and I did not know at that time that Jaffna authorities . . . campus authorities, they were using me as (indiscernible)."

Mr. Adhiyappa gave the university officials and government security forces the names of students whom he believed were involved in attacking people, robbing banks, and recruiting others to join the terrorist movement. He reported to Mr. Yogeswaran, the district manager in Jaffna, and worked with him closely.

LTTE was clearly aware of Mr. Adhiyappa's political views and that he was working against them by advising the students against involvement in their cause and by informing the government and university officials of its student members' activities. Mr. Adhiyappa was personally identified as an enemy by the separatists, including in face-to-face confrontations with LTTE's leader. Whenever Sri Lankan soldiers would go after the terrorists, they in turn would threaten Mr. Adhiyappa and Mr. Yogeswaran.

By 1983, the government's control over northern Sri Lanka

began to erode and its ability to check the terrorists receded. The court system ceased to operate because of the terrorists' threats. Fearing for his life, Mr. Adhiyappa and his wife fled to the United States in August 1983. His colleague, Mr. Yogeswaran, fled to India at about the same time. When Mr. Yogeswaran returned to Sri Lanka in 1986 he was assassinated by LTTE. Mr. Adhiyappa's colleague was one of the many people who were deemed to be traitors who were later killed by the terrorists. Mr. Adhiyappa fears a similar fate if he is forced to return to Sri Lanka.

Subsequent to Mr. Adhiyappa's flight to the United States, there have been movements toward peace in Sri Lanka, but those efforts have been futile. Currently, a bloody war is raging between the army and LTTE for control of the city of Jaffna.

**B. Procedural History**

In 1989 the INS commenced deportation proceedings against Mr. Adhiyappa pursuant to 8 U.S.C. § 1251(a)(4), which authorizes the Attorney General to deport any alien who, after entry into the United States, is convicted of two crimes involving moral turpitude.[1] Mr. Adhiyappa did not deny deportability but requested asylum and withholding of deportation. In December 1989 a merits hearing was conducted by an Immigration Judge. Mr. Adhiyappa testified that he feared continued persecution, including attacks against his life, by Tamil separatist guerrilla organizations which he had opposed. He testified that he had long opposed the separatist movement, and that while he was a lecturer at Jaffna University in northern Sri Lanka he had (1) in

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1. On April 14, 1987 and on February 28, 1989, Mr. Adhiyappa was convicted of theft offenses. On the first occasion, he pleaded no contest to a charge that he had placed one transistor battery in his pocket while shopping for groceries; on the second occasion, he pleaded no contest to a charge that he transferred the price tag from one television set to a similar one which did not have a price tag.

the classes he taught, discussed the reasons for his opposition to the guerrilla movement, (2) counseled students not to join the movement, and (3) provided government officials information about the guerrillas' activities. Mr. Adhiyappa also testified that he had been repeatedly threatened by the guerrillas and their student sympathizers. His testimony was uncontroverted. The Immigration Judge concluded that Mr. Adhiyappa has a political opinion of opposition to the separatist movement, but that he had not provided sufficient evidence that the guerrillas would still be interested in him and that they would be able to take action against him in all regions of the island. In an oral decision, the Immigration Judge denied the requested relief.

Mr. Adhiyappa timely filed an appeal to the Board. The appeal concerned the determination by the Immigration Judge that asylum should be denied for lack of evidence of the terrorists' continued interest in Mr. Adhiyappa and their ability to take action against him throughout the country. Mr. Adhiyappa's brief did not address whether his past and future persecution is "on account of . . . political opinion" because it was not an issue in the Immigration Judge's decision. Nor did the INS discuss this issue in its brief to the Board. There was no oral argument.

While the appeal was pending before the Board, Mr. Adhiyappa filed a motion to remand the case to the Immigration Judge for consideration of new evidence regarding the activities of LTTE, which had become the preeminent Tamil guerrilla organization. This evidence went directly to the Immigration Judge's concerns about Mr. Adhiyappa's fear of persecution by LTTE throughout Sri Lanka and LTTE's continued interest in seeking retribution against someone like him. The new evidence consisted of 47 exhibits, including the affidavit of a U.S. political scientist who serves as a consultant to the U.S. State Department on Sri Lanka. It was clear that the LTTE guerrillas were operating throughout Sri Lanka and elsewhere, that they would have the

intent and ability to persecute Mr. Adhiyappa, and that he had a well founded fear of persecution.[2]

On February 8, 1994, the Board issued a decision affirming the Immigration Judge's denial of the applications for asylum and withholding of deportation. The Board's decision, however, was based entirely on its determination that Mr. Adhiyappa had failed to demonstrate that the Tamil terrorist organizations' persecution of him would be "on account of . . . political opinion" or some other basis of the statutory definition of refugee. The Board stated:

> Yet the respondent has not established that any interest the Tamil militants might still have in him would be on account of race, religion, nationality, membership in a particular social group, or political opinion. *Their interest would appear to be for retaliation against a perceived informer, which would not be persecution on account of*

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2. The evidence showed that LTTE, in its fight to create a Tamil state, has been responsible for killing thousands, including the following: the assassination of 17 members of the rival Tamil party (EPRLF) in Madras, India in May 1990; LTTE conducted the suicide bombing assassination of Rajiv Ghandi, the former Prime Minister of India, which left at least 15 others dead, on May 21, 1991 in India; LTTE conducted the bombing assassination of Sri Lankan Defense Minister Rajan Wijeratne in Sri Lanka, killing more than 30 persons; LTTE conducted the bombing of Military Operations Headquarters in Colombo on June 21, 1991, killing more than 20 people and injuring at least 50; an LTTE suicide bomber killed the Sri Lankan Navy Commander in Colombo in November 1992; an LTTE suicide bomber killed Sri Lankan President Ranasinghe Premadasa and others in Colombo on May 1, 1993; and LTTE was conducting operations against persons it considered "traitors", in the northern, southern, eastern and western sections of the country. LTTE has developed into one of the most feared terrorist organizations in the world. Its 10,000 members are notorious for the cyanide capsules they wear on necklaces, to be used to prevent capture by government troops.

> *a protected status; it is reasonable to assume that the retaliation would occur regardless of what political opinion, if any, the respondent held.* (emphasis added)

(Appendix C at 29a). The Board also denied the motion to remand as essentially irrelevant because it had determined, for the reasons stated above, that Mr. Adhiyappa had not established a prima facie case of eligibility for the relief sought.[3]

Mr. Adhiyappa then timely filed an appeal to the United States Court of Appeals for the Sixth Circuit. On June 28, 1995, in a split decision, the Court of Appeals affirmed, finding that the Board's determination that Mr. Adhiyappa's persecution was not on account of his political opinion was supported by substantial evidence. *Adhiyappa v. INS*, *supra* at 261.

## REASONS FOR GRANTING THE WRIT

### SUMMARY

The Court of Appeals for the Sixth Circuit has required an applicant for asylum, on account of political opinion, to demonstrate that his or her persecutor is motivated exclusively by the applicant's political thought, and not to any degree by actions which the applicant has taken against the persecutor's interest. The Court of Appeals has demanded such a showing even if the applicant's actions stem entirely or partially from his or her opinion of opposition to the persecutor's objectives. This restrictive interpretation of the asylum law imposes an evidentiary burden that few, if any, applicants can meet. Most significantly, however, such a construction illogically excludes

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3. On December 1, 1995, Mr. Adhiyappa filed a Motion for Reconsideration with the Board. That Motion is pending. Under *Stone v. INS*, __ U.S. __, 115 S. Ct. 1537 (1995), Mr. Adhiyappa is compelled to proceed with his request for a writ of certiorari at this time.

from the law's protection those who are in the gravest danger of persecution.

The Sixth Circuit's decision to affirm the Board rests upon a strained interpretation of this Court's decision in *INS v. Elias-Zacarias*; it is also in sharp conflict with decisions from other circuits on this important issue. It is respectfully requested that this Court grant the writ of certiorari to resolve the conflict and clarify the law.

## I.

## OUR ASYLUM LAW MUST NOT BE INTERPRETED AS DENYING PROTECTION TO PERSONS WHO TRANSLATE THEIR POLITICAL OPINION INTO ACTION

There is a real danger that a court sitting in an American city will use present American values and perspectives to construe events and concepts in far away places. As the current scholarship in literary criticism and epistemology teaches, such a value-laden result may have nothing to do with the objective reality on the ground. To state the obvious, Jaffna, Sri Lanka is not Cincinnati, Ohio, nor is the Tamil separatists' guerrilla war for a Tamil state comparable to editorial page exchanges over statehood for the District of Columbia.

Since its independence, Sri Lanka has been going through a stage that political scientists call "primitive unification." It is a process that all countries must undergo before they can become a viable nation-state. Even the United States did not escape this stage in its development. During such a period, mechanisms for the free exchange of ideas and for due process are either nonexistent, or they are sharply curtailed — as during our own Civil War. In Sri Lanka, which is now engaged in a bloody civil

war, there are no functioning democratic institutions — at least not in LTTE's stronghold. In the killing fields of Sri Lanka, one does not express his or her political opinion by writing a letter to the editor of the local newspaper. Sri Lanka is not the United States, and Jaffna, where Mr. Adhiyappa was a lecturer, is not Cincinnati, Ohio. Sri Lanka is a country besieged by brutality on all sides. In Sri Lanka, "Blood and destruction [are] so in use, And dreadful objects so familiar," that the sound one hears is not that of a polite debate, but that of "carrion men, groaning for burial." It was in such a context that Mr. Adhiyappa tried, in the only way that he could, to keep Sri Lanka unified. He was opposing a brutal guerrilla movement; he was not conducting a polite debate at a Rotary Club.

The Immigration Judge, who carefully observed and questioned Mr. Adhiyappa, concluded that he had a political opinion of opposition to the separatist movement. In 1989, however, the Immigration Judge's denial of the asylum application was informed by peace negotiations in Sri Lanka between the government and the guerrillas and the fact that Mr. Adhiyappa had not provided sufficient evidence that the guerrillas were active throughout the country. In response to the Immigration Judge's concerns, Mr. Adhiyappa submitted substantial evidence that the peace negotiations had failed and that LTTE was active throughout Sri Lanka.

To the Board and the Court of Appeals, the Immigration Judge's finding that Mr. Adhiyappa had a political opinion was of no significance. By acting on his beliefs, in the opinion of the Board and the court below, Mr. Adhiyappa had moved outside the protection of our asylum law. The Court of Appeals held:

> Congress has enumerated certain attributes which are protected. This list provides protection for individuals who are persecuted

> on account of their political opinion, but it does not include all individuals who are persecuted because their actions tend to obstruct the activities of politically-motivated organizations, even where those activities may be in part motivated by political opinion. The statute provides protection only where the past or anticipated persecution is on account of political opinion, regardless of whether the persecuted acts on that opinion; we are bound to follow that standard.

*Adhiyappa v. INS, supra* at 268.

Similarly, the Board has interpreted the asylum statute as authorizing asylum for political opinion, but not for political action, as if there were a bright light separating the two in the political arena.[4] Under that test, in order for a person to qualify for asylum on account of political opinion, he must demonstrate that his persecutors' actions against him would be motivated *exclusively* by his political opinion of opposition to them and their cause, and that they are not also motivated, even in part, by the actions which he has taken against them because of his opposition to their cause. Under this standard, Mr. Adhiyappa would have qualified for asylum if the Tamil separatist groups had merely threatened him because he solely *believes* that they should be thwarted, but he would not qualify if they try to kill him because of *actions* which he took to defeat their cause.

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4. The principle of deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), requires that the courts defer to an agency's construction of a statute, when that agency is charged with administering the law enunciated in the statute.

Such a standard is incorrect and unreasonable. First, it would be illogical to deny asylum because the persecutor would be motivated in part by the actions which the applicant has taken based upon his political views; instead, this should be greater cause, not a lesser one, for finding the requisite elements of refugee status on account of political opinion. Second, this test requires an applicant to demonstrate conclusively that his or her persecutor is motivated solely by the applicant's opinion, a burden that no one can or should bear.

The courts and the Board have recognized the inherent difficulties that asylum applicants have in attempting to document the actions of their persecutors, and have therefore ruled that the applicants' own credible testimony can suffice. *See, e.g., Matter of Mogharrabi* Interim Dec. 3028 (BIA 1989). The court below would now require an applicant to demonstrate not only his persecutors' actions, but their thoughts as well. Here, the Board stated, and the Court of Appeals concurred, that it is reasonable to conclude that the terrorists would persecute Mr. Adhiyappa for his actions, regardless of his political opinion. However, it is also reasonable to conclude, based on the documented record of the guerrillas' actions, that they well might, or even likely would, persecute Mr. Adhiyappa solely for his beliefs. Persecutors seldom "provide their victims with affidavits attesting to their acts of persecution." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984). Here, however, the Court of Appeals has required Mr. Adhiyappa to prove a negative with evidence which few, if any, asylum seekers could ever obtain, i.e. the thoughts of their persecutors.

In this case, the only fact which is not clearly in the record is the precise degree to which the terrorists' motivation to persecute Mr. Adhiyappa is based upon the fact that he believes that their cause is wrong, versus the fact that he personally voiced his opposition to their movement, versus the fact that he openly told

students that they should not join the movement, versus the fact that he served as a government informant against them. Unless Mr. Adhiyappa can put Velluppillai Pirabhakaran, who is the leader of the LTTE guerrillas and who was involved in face-to-face confrontations with Mr. Adhiyappa, on the couch, the exact significance of the guerrillas' motivating factors will remain unfathomable. Even if such a psychoanalytic session could be arranged, it is unlikely that Mr. Pirabhakaran would be able to rationally distinguish among the various factors which motivated his organization to threaten Mr. Adhiyappa and call him a traitor. In his mind, and in the mind of his fanatical followers, Mr. Adhiyappa, and others like him, must be eliminated, for any one factor or for any combination of the factors stated above. What is clear is that LTTE's motivation to persecute Mr. Adhiyappa is based upon his political opinion of opposing their goal to carve up his small island country.

This Court's decision in *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992), is the only opinion which the Court of Appeals relied upon in upholding the Board's restrictive interpretation of the refugee definition. In that case, this Court held that a guerrilla organization's attempt to coerce a person into performing military service does not "necessarily" constitute "persecution on account of . . . political opinion" under 8 U.S.C. § 1101(a)(42). Mr. Elias-Zacarias had testified that two armed, uniformed guerrillas came to his house and asked him to join them, but he refused. He stated that he did not want to join the guerrillas because the guerrillas were against the government and he was afraid that the government would retaliate against him and his family if he joined the guerrillas. There was no evidence that the applicant opposed the operations of the guerrillas or their political goals.

This Court held that "persecution on account of . . . political opinion is persecution on account of the *victim's* political

opinion, not the persecutor's." 502 U.S. at 482, 112 S. Ct. 816. The Court stated that the record must demonstrate that the applicant had a political opinion and that he had a well-founded fear that the guerrillas would persecute him because of that political opinion, rather than because of his refusal to fight with them. From the record, the Court determined that the applicant did not have a political motive, and that he refused to join the guerrillas only because he was afraid that the government would retaliate against him and his family. *Id.*

This Court observed that one cannot assume that "a person who resists recruitment by a guerrilla organization is necessarily expressing a political opinion hostile to the persecutor." *Id.* The facts before this Court offered a striking example of this, because the record demonstrated, unequivocally, that Mr. Elias-Zacarias had a political opinion of neutrality concerning the struggle between the guerrillas and the government. This Court stated that "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of reasons — fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." *Id.*

In arriving at its conclusions, the Court of Appeals speculated that an analogy between Mr. Elias-Zacarias and Mr. Adhiyappa "*could* be drawn." 58 F.3d at 267 (emphasis supplied). Beyond the fact that both Mr. Adhiyappa and Mr. Elias-Zacarias are members of the human race and both lived in countries torn by a bloody civil strife, they have nothing in common.

Mr. Elias-Zacarias was an uneducated peasant who did not care who won or lost the Guatemalan civil war; he only wanted to be left alone to till his land. Mr. Elias-Zacarias' motive for not joining the guerrilla groups was personal; he was concerned for the safety of himself and his family. He was not making a

political statement by refusing to join the ranks of the guerrillas. Mr. Adhiyappa, on the other hand, is an intellectual who deeply believed that the balkanization of such a small island country would be disastrous for his fellow Indian Tamils. His political opinion was based on his ethnicity and the great suffering he and his family had endured, and his study of political geography. He expressed that opinion in his lectures and in his discussions with colleagues and students. He had made a conscious decision to speak out against the guerrillas. He tried to persuade students not to join the guerrillas and he spoke against their goal. His audience in his classroom and outside the classroom were the sons and daughters of the elites in northern Sri Lanka, i.e. Tamils; if those students survive the civil war, they will be the future leaders of that region. To the guerrillas, Mr. Adhiyappa was a dangerous subversive.

In addition, it was precisely because Mr. Adhiyappa spoke out against the guerrillas that he was asked by the university officials to advise the students against joining the separatist movement and to report on the guerrillas' activities on the campus. Other lecturers and university employees had refused to do what Mr. Adhiyappa agreed to do.

The court below incorrectly interpreted *Elias-Zacarias* to stand for the proposition that actions taken by the victim which are motivated by his political opinion will make him ineligible for asylum. This interpretation flies in the face of logic and common sense. As the Dissent below correctly concluded, "[u]nlike race, political opinion is perceived only by its expressions. Thus when acts, such as those of Adhiyappa, so clearly express a political opinion, persecution on account of those actions is persecution on account of political opinion." *Id.* at 270.

The court below also concluded that Mr. Adhiyappa's motives were unclear and that he may have acted simply to keep

his job. This is incorrect. However, even assuming, *arguendo*, this were correct, it would be irrelevant. As was stated by the Dissent, "[u]nder *Elias-Zacarias*, however, Adhiyappa's motives are irrelevant, *except* as they elucidate the motives of his alleged persecutors. Instead, it is the motives of the alleged persecutors that are pertinent." *Id.* at 269. The Tamil separatists "made clear their intent to kill any who actively opposed their separatist movement by informing on them." *Id.* In addition, the record demonstrated that it would be reasonable to assume that the guerrillas would have attempted to persecute Mr. Adhiyappa because of his political opinion even if he had not informed government or university officials of their activities. The Court of Appeals chose not to make such an inference; instead it concluded that because Mr. Adhiyappa's action could lead to a different inference he was not within the ambit of the asylum statute. But, as the Dissent noted, "It is difficult to see how persecutors can identify targets of persecution based on political opinion, except through political expression and activity." *Id.* at 270.

## II.

## THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON THIS IMPORTANT ISSUE IS IN CONFLICT WITH THOSE OF THE OTHER UNITED STATES COURTS OF APPEALS

The Board's narrow interpretation of the "on account of" requirement of the refugee definition has been criticized by several courts, including the court below. In *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994), Perkovic and his sister were Yugoslavian of Albanian descent. Before arriving in the United States, they had been active in Yugoslavia, promoting civil rights for ethnic Albanians. Mr. Perkovic, while a university student, helped organize fellow students to advance Albanian civil rights. The Board concluded that the Perkovics' fear of persecution in

their home country resulted from their commission of crimes against a duly constituted government and the Perkovics "did not fear persecution on account of . . . political opinion." *Id.* at 621. Reversing the Board's denial of asylum, the court stated, "we conclude that the Board's construction of the statute in this case was directly contrary, both to the manifest intent of Congress in enacting the asylum law, and to the Board's prior decisions." *Id.* In arriving at its conclusion, the court observed that the Board had been too restrictive in its interpretation of the "on account of" requirement of the refugee definition. *Id.* at 622, *citing Osorio v. INS*, 18 F.3d 1017 (2nd Cir. 1994).

*Osorio* concerned a Guatemalan union leader who sought asylum in the United States. The Immigration Judge denied his application. The Board affirmed, stating, "the dispute between Osorio and Guatemala is fundamentally 'economic'." In reviewing the Board's analysis, the court found that, "the Government's [INS] argument betrays an impoverished view of what political opinions are. . . ." *Id.* at 1030. One of the issues before the court was "whether Congress intended to exclude from eligibility applicants who were persecuted because of their political beliefs *and* their involvement in an economic dispute with their government." *Id.* at 1020 (emphasis supplied). The court stated that under the Board's "narrow" interpretation of what constitutes political opinion, "Aleksandr Solzhenitsyn would not have been eligible for political asylum because his dispute with the former Soviet Union is properly characterized as a literary, rather than a political dispute." *Id.* at 1028-29. As in *Osorio*, there is no way to unravel Mr. Adhiyappa's actions from his political thoughts. His opinion that Sri Lanka must remain unified and the actions that he took to promote that opinion were like mingled yarn; they are inseparable.

In *Sotelo-Aquije v. Slattery*, 17 F.3d 33 (2nd Cir. 1994), Mr. Sotelo's asylum petition was denied because, although he "feared

persecution from the Shining Path guerrilla organization," the Board concluded that, "the 'organization' targeted him not on account of his political opinion but because of his position in CUAVES, a municipal governing body." *Id.* at 35. In reversing the Board, the court observed that:

> Sotelo spoke out against the Shining Path and that only those CUAVES members who actively opposed the guerrilla group became targets of its violence. These findings and the record before us compel the conclusion that Sotelo had a well-founded fear of persecution on account of his acts and expressions of political opposition to the Shining Path.

*Id.* at 37.

Again, in *Rivas-Martinez v. INS*, 997 F. 2d 1143 (5th Cir. 1993), the court rejected the Board's determination that a non-political excuse proffered by a woman to guerrillas, i.e., that she could not assist them because of her need to care for her young daughter, precluded a grant of asylum. The court stated:

> Nowhere does *Elias-Zacarias* reject the common sense approach which allows immigrants to demonstrate that, irrespective of nonpolitical excuses voiced to conscriptors in face-to-face encounters, those conscriptors knew or would learn of the political opposition of the potential conscript by extraneous evidence, *e.g., her working for the opposition,* her utterances against the guerrillas, or the affiliation of her family members with the government. Moreover, *Elias-Zacarias* specifically provides that

> aliens who seek asylum can prove, either by direct or circumstantial evidence that the guerrillas persecuted or will likely persecute them because of the alien's political opinion. (emphasis added)

997 F.2d at 1148.

In *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988), a Ghanian soldier who had participated in a *coup d'etat* against the government of Ghana was refused asylum in the United States. The Board took the position that "a person can qualify for refugee status if he faces persecution for openly espousing anti-government views, but that he cannot so qualify if he faces persecution for acting on those views." *Id.* at 974. The court, in reversing the Board, stated that in joining the coup, the asylum applicant's "political expression [was] embodied in his political act." *Id.* at 979.

Finally, in *Singh v. Ilchert*, 801 F. Supp. 313 (N.D.C. 1992), *aff'd*, 63 F.3d 1501 (9th Cir. 1995), the court held that a persecutor's mixed motives does not preclude a finding that persecution was on account of political opinion. Under this line of cases, any requirement that an asylum applicant demonstrate the exact motivating factors of a persecutor is clearly rejected.

## CONCLUSION

In countries engaged in a bloody war, individuals holding fierce political convictions will often choose, or are forced, to act on their opinion. Such individuals, whose politically motivated actions bring them to the attention of their political opponents, are the very persons who our asylum law is intended to protect. A major conflict exists among the circuits on this important issue, stemming from a profound confusion about what this Court enunciated in *INS v. Elias-Zacarias*. Therefore, it is respectfully requested that this Court grant certiorari to make it crystal clear that its decision in *INS v. Elias-Zacarias* in no way denies asylum protection to persons whose political opinion has evolved into action.

Respectfully submitted,

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## APPENDIX A — SIXTH CIRCUIT ORDER DENYING PETITION FOR REHEARING, FILED SEPTEMBER 13, 1995

No. 94-3396

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THIYAGARAJAH ADHIYAPPA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

Respondent.

ORDER

BEFORE: KENNEDY and DAUGHTREY, Circuit Judges, and CLELAND,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

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* Hon. Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation

*Appendix A*

Accordingly, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Mr. Firooz T. Namei
McKinney & Namei
441 Vine Street
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Cincinnati, OH 45202

## APPENDIX B — DECISION BY THE SIXTH CIRCUIT, FILED JUNE 28, 1995

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0195P (6th Cir.)
File Name: 95a0195p.06

No. 94-3396

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THIYAGARAJAH ADHIYAPPA,

*Petitioner,*

*v.*

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

ON PETITION for Review of an Order of the
Board of Immigration Appeals

Decided and Filed June 28, 1995

Before: KENNEDY and DAUGHTREY, Circuit Judges; CLELAND, District Judge.*

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

*Appendix B*

CLELAND, D.J., delivered the opinion of the court, in which KENNEDY, J., joined. DAUGHTREY, J. (pp.15-19), delivered a separate dissenting opinion.

CLELAND, District Judge. Thiyagarajah Adhiyappa ("Petitioner") seeks review, pursuant to 8 U.S.C. § 1105a(a), of a final order of deportation issued by the Board of Immigration Appeals. While conceding deportability under 8 U.S.C. § 1251(a)(4)[1], which permits deportation of an alien who is convicted of two crimes involving moral turpitude, Petitioner seeks asylum under 8 U.S.C. § 1158(a), withholding of deportation pursuant to 8 U.S.C. § 1253(h), and voluntary departure pursuant to 8 U.S.C. § 1254(e). We deny the petition.

I.

In order to prevail on his petition for asylum or withholding of deportation, Petitioner must show, *inter alia*, that he has a well-founded fear of persecution in Sri Lanka, his country of origin, on account of his political opinion, or that his life or freedom would be threatened in Sri Lanka on account of his political opinion. Accordingly, a short review of the history of Sri Lanka and its current political situation — neither of which was disputed by the parties — is appropriated.[2]

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1. The applicable statute is the one in effect on the date deportation proceedings commenced, April 29, 1989. (Joint Appendix 99). The parties agree that the applicable section is § 1251(a)(4). (Petitioner's Brief 3, Respondent's Brief 4) This statute was subsequently reorganized; under the current scheme, the applicable section is § 1251(a)(2)(ii). The substance of the law, however, has not changed.

2. Most of the following background information is extracted from Petitioner's Personal Statement (Joint Appendix 174-180).

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## A. Background Facts

Sri Lanka is a small island nation approximately 270 miles from north to south and approximately 140 miles from east to west. Formerly known as Ceylon, it is just off India's southeast coast. Approximately 74 percent of the population are Sinhalese; 12.5 percent Sri Lankan Tamils, who migrated to Sri Lanka from southern India many centuries ago; seven percent are Muslim; and 5.5 percent are Indian Tamils — more recent arrivals brought there by the British to work the tea estates in the central part of the country. Petitioner is an Indian Tamil.

Since its independence from Britain in 1948, the Sinhalese have been in power in Sri Lanka. Sinhalese has been made Sri Lanka's official language and Buddhism its religion. Sinhalese receive preference in hiring for the civil service and university admissions. Indian Tamils, on the other hand, are a disadvantaged group in Sri Lanka; they are both exploited and ignored — the untouchables of Sri Lanka. Petitioner's status as an Indian Tamil is stated on his birth certificate and, because of that status, he was not given Sri Lankan citizenship until he turned 25 years old. The Sri Lankan Tamils fall in between the Sinhalese and the Indian Tamils on the social scale in Sri Lanka.

Since it became independent from Britain, Sri Lanka has been rocked by political, religious, cultural, and ethnic violence. A major area of contention has been the proposal that part of the island be established as a separate Tamil nation controlled by the Sri Lankan Tamils. The separate state would include approximately one-third of the country in the north and east. Sri Lankans Tamils generally favor this proposal, while Sinhalese and Indian Tamils generally oppose it. Petitioner strongly opposes the creation of a separate Tamil nation.

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Petitioner earned a graduate degree in geography from the University of Peradeniya, and, in September 1980, he obtained a position as a geography instructor at Jaffna University in Sri Lanka. In March 1981, the chancellor of the university asked Petitioner to be an assistant student advisor, and Petitioner accepted the position. His duties included advising freshmen students; observing Sri Lankan Tamil student group activities at the campus and attempting to prevent terrorist activities; and cooperating with Sri Lankan security forces' investigations of student activities. In short, part of his job was to inform university and government officials about Sri Lankan Tamil student activists who were taking action to pressure the government to create a separate Tamil nation. He performed this role until 1983. Petitioner also encouraged students not to get involved in Sri Lankan Tamil terrorist organizations.

Petitioner testified at his hearing that members of militant separatist groups would come to his house, which he shared with other instructors, call him a traitor, and threaten to kill him if he continued to provide names to the authorities. (Joint Appendix 14-15). Because Petitioner was on the side of the government, he felt some protection from the separatists. However, the government's control over northern Sri Lanka began to erode, and its ability to check the terrorists began to recede. In 1983, Petitioner began to fear for his life. Around this time, the court system ceased operating because of the terrorists' threats to the judges and others. As a result of this situation, Petitioner fled to the United States in August 1983. One of his colleagues, a lawyer who represented the Jaffna area in the national parliament, fled to India about the same time. When that colleague returned to Sri Lanka in 1986, though, he was assassinated. Petitioner's colleague was one of many people deemed by the militants as traitors and killed. Petitioner asserts that he fears a similar fate if forced to return to Sri Lanka.

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Subsequent to Petitioner's flight to the United States, there have been movements toward peace in Sri Lanka, but those efforts have been, for the most part, unsuccessful. Tamil separatist organizations operate openly throughout the northern and eastern sections of the country, in areas not controlled by the Sinhalese government. Though provisional governments have been elected, the terrorist organizations continue to operate in opposition to the government. Petitioner testified at his hearing before the immigration judge that the Tamil terrorist organizations "control everything." "They make rules, they enforce rules, they mainly kill their enemies. Whoever they think is enemies, they just kill them. There is no justification or anything." (Joint Appendix 150).

Petitioner has lived in Cincinnati, Ohio with his wife since entering the United States with student visas in 1983. He is 41 years old. On April 14, 1987 and on February 28, 1989, he was convicted of theft offenses. On the first occasion, he pleaded no contest to a charge that he had placed one transistor battery in his pocket while shopping for groceries; on the second occasion, he pleaded no contest to a charge that he transferred the price tag from one television set to a similar one which did not have a price tag.

**B. Procedural History**

Respondent Immigration and Naturalization Service ("INS") commenced immigration proceedings against Petitioner in 1989 pursuant to 8 U.S.C. § 1251(a)(4), which provides authority for the Attorney General to deport any alien who, at any time after entry into the United States, is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. In the deportation proceedings and before

this court, Petitioner conceded deportability on the basis of his two misdemeanor convictions but sought asylum pursuant to 8 U.S.C. § 1158(a), withholding of deportation pursuant to 8 U.S.C. § 1253(h), and voluntary departure pursuant to 8 U.S.C. § 1254(e).

In a July 10, 1989 hearing, the immigration judge denied Petitioner's request for voluntary departure on the ground that Petitioner falls within the class of persons statutorily ineligible for voluntary departure, aliens who have been convicted of two crimes involving moral turpitude. Petitioner does not press for the voluntary departure relief before this court.

The immigration judge conducted another hearing on December 11, 1989, to consider the requests for asylum and withholding of deportation. At the conclusion of the hearing, the immigration judge issued an oral decision in which he found Petitioner to be deportable and denied each of the applications for relief. (See Joint Appendix, 92-97). To qualify for asylum, Petitioner must show that he is a

> person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). *See also*, 8 U.S.C. § 1158(a). The applicable standard for withholding of deportation is similar to

the standard for asylum but provides less discretion to the attorney general in deciding whether or not to deport. 8 U.S.C. § 1253(h) provides:

> (h)(1) The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19))[3] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The immigration judge concluded that Petitioner does have a political opinion, but that he had not provided sufficient evidence that his position "is the concern of anybody at this time. Particularly in light of the recent accords as to whether or not there should or should not be a separate state." (Joint Appendix 95-96). The immigration judge noted that there is civil unrest, but he concluded that Petitioner failed to show that there is a persecutor in Sri Lanka who would be aware of Petitioner's political opinion and willing and able to persecute him on account of it. The immigration judge further noted, "[T]he terrorist groups the respondent [Petitioner here] referred to do not seem to be operating heavily in that area. At least the respondent [Petitioner] has not offered evidence to establish such." (Joint Appendix 96). Thus, the immigration judge determined that Petitioner failed to establish that he was persecuted or has a well-founded fear of persecution.

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3. This section relates to aliens who assisted in Nazi persecution or engaged in genocide. *See* 8 U.S.C. § 1251(a)(4)(D).

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Petitioner timely appealed to the Board of Immigration Appeals ("the Board") the immigration judge's denials of the requests for asylum and withholding of deportation. In July 1993, while the appeal was pending, Petitioner requested that the Board remand the matter to an immigration judge for consideration of new evidence. On February 8, 1994, the Board issued a decision and final order of deportation, denying the motion to remand and affirming the decision of the immigration judge. The Board determined that Petitioner had failed to demonstrate that the persecution he alleged he had suffered and feared he would suffer again would be on account of his political opinion or some other required basis[4]. The Board focused on the *reason* for the allegedly feared persecution, rather than whether Petitioner reasonably feared persecution. The Board wrote,

> He asserts that he mainly fears Tamil militants, as they made threats against him over a decade ago for informing authorities about students involved in their movement. Yet the respondent has not established that any interest the Tamil militants might still have in him would be on account of his race, religion, nationality, membership in a particular social group, or political opinion. Their interest would appear to be for retaliation against a perceived informer, which would not be persecution on account of a protected status; it is reasonable to assume that the retaliation would occur regardless of what political opinion, if any, the respondent held.

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4. The only ground which Petitioner has pressed is "political opinion."

(Joint Appendix 8). On April 14, 1994, Petitioner timely petitioned this Court for review.

## II.

Review of the Board's factual determinations is subject to the substantial evidence standard of review. The statute provides that "the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." 8 U.S.C. § 1105a(a)(4). "All the substantial evidence standard requires is that the BIA's conclusion, based on the evidence presented, be substantially reasonable." *Klawitter v. INS*, 970 F.2d 149, 151 (6th Cir. 1992) (quoting *Diaz-Escobar v. INS*, 782 F.2d 1488, 1493 (9th Cir. 1986)). "Substantial evidence is thus a deferential standard which 'plainly does not entitle a reviewing court to reverse . . . simply because it is convinced that it would have decided the case differently.' " *Klawitter*, 970 F.2d at 151-152 (quoting *DiCicco v. INS*, 873 F.2d 910, 912 (6th Cir. 1989)). "[I]n order to reverse the BIA's factual determinations, the reviewing court must find that the evidence not only supports a contrary conclusion, but indeed compels it." *Klawitter*, 970 F.2d at 152 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481, n.1 (1992)). Legal determinations are reviewed *de novo* by the court. *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988).

## III.

### A. Voluntary Departure

Petitioner is not entitled to voluntary departure under U.S.C. § 1254(e). That section provides a specific exception for aliens within the provisions of § 1251(a)(2)-(4); § 1251(a)(4) is the

subsection which refers to aliens who have been convicted of two crimes involving moral turpitude; and Petitioner has admitted that he falls within that classification. The statute provides no authority to permit voluntary departure for such aliens. Petitioner recognized this at the July 10, 1989 hearing, and he has not pursued the issue here. Accordingly, the petition for voluntary departure is denied.

**B. Asylum and Withholding of Deportation**

In order to gain asylum, Petitioner must show that he meets the statutory definition of "refugee." 8 U.S.C. § 1158(a) provides, in pertinent part, that an "alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. § 1101(a)(42)(A) provides that, to be a refugee, one must be unable or unwilling to return to, and unable or unwilling to avail himself of the protection of, his home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. There is no dispute in this case that Petitioner is a person outside the country of his nationality and that he is unwilling to return to that country because of persecution. Respondent has not contested Petitioner's allegation that he is unable or unwilling to avail himself of the protection of the government of Sri Lanka. Petitioner further asserts that he would be persecuted on account of his political opinion. It is this contention with which Respondent disagrees.

The standard for withholding of deportation is similar, but it provides less discretion to the Attorney General and imposes a more stringent standard on the alien. 8 U.S.C. § 1253(h)(1)

provides that the Attorney General shall not deport any alien if she determines that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Thus, in order to show eligibility for either asylum or withholding of deportation, Petitioner must show that the persecution he fears if returned to Sri Lanka is "on account of his political opinion."

The United States Supreme Court examined the issue before us now — whether the persecution an alien fears is on account of his political opinion or, on the other hand, on account of his actions or inactions — in *INS v. Elias Zacanas*, 502 U.S. 478 (1992). In *Elias-Zacanas*, the respondent was a native of Guatemala who, like Petitioner, conceded his deportability but requested asylum and withholding of deportation. He had testified that when he was 18, two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home and asked his parents and him to join with them. They all refused. The guerrillas told them they would be back, and that they should reconsider their decision not to join. The respondent testified that he did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he joined the guerrillas. *Id.* 481. He left Guatemala about two months after the visit from the soldiers, allegedly because he was afraid that they would return. The immigration judge concluded that Elias-Zacarias had failed to demonstrate persecution or a well-founded fear of persecution on account of one of the enumerated grounds. The Board of Immigration Appeals dismissed Elias-Zacarias's appeal on procedural grounds and declined to reopen his deportation hearing so that he could submit new evidence that, following his departure from Guatemala, the guerrillas had twice returned to his family home in continued efforts to recruit him.

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The Board determined that, even with this new evidence, Elias-Zacarias had failed to make a prima facie showing of eligibility for asylum and had failed to show that the results of his deportation hearing would be changed. The Ninth Circuit reversed, finding that a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of . . . political opinion," because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Elias Zacarias v. INS*, 921 F.2d 844, 850 (1990).

In reviewing the Ninth circuit's decision, the Supreme Count framed the issue as "whether a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes 'persecution on account of . . . political opinion' under § 101(a)(42) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(42)]" and concluded that it did not. The Court focused on the factual nature of the inquiry, and emphasized the deference to be accorded to the Board. The Court found that the Board's determination was supported by substantial evidence, noting that even a person who supports a guerrilla movement might resist recruitment because of fear of combat, a desire to remain with his family and friends, and the like. The Court further explained that Elias-Zacarias's professed reason for refusing to join the guerrillas — because he was afraid that the government would retaliate against him and his family if he did so — was not a political motive.

An analogy between Elias-Zacarias and Petitioner could certainly be drawn. One might undertake to inform government officials of the names of members of a militant separatist group for reasons other than political opinion, just as one might refuse

to join a guerrilla army for reasons other than political differences. Petitioner was, after all, an employee of a state university and a member of a historically scorned ethnic group. Helping the government would presumably improve his position within the university. Like Elias-Zacarias, Petitioner could avoid government retribution by going along with government objectives. Petitioner contrasts his situation to Elias-Zacarias's by arguing that his actions were motivated primarily by his deeply-held political opinion opposing a separate Tamil state. This court does not doubt, and Respondent does not contest, that Petitioner was indeed motivated, at least in part, by his political opinion. However, Petitioner's testimony before the immigration judge indicates motives other than his political opinions are possible. Petitioner testified that when he accepted the job as an instructor at Jaffna University he

> did not know the situation political situation [sic] in Jaffna, because I was not born and raised in Jaffna. . . . When I went to Jaffna, I could not understand the society. And the chancellor asked me to be assistant student . . of his . . so I accepted to perform that duty.

(Joint Appendix 117-118). Some of Petitioner's comments could be interpreted as saying that he continued to act as an informer because he felt he had to in order to keep his job.

> So they [the terrorists] warned us . . for not to get involved in these kind of activities. Having no choice I continued to record incidents to the security forces and also to the university authorities.

(Joint Appendix 118).

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> They [the terrorists] said if you continue to do that, we will kill you. But having no choice, I had to hold on to my job, I had to report to the university as well security forces.

(Joint Appendix 119). One could conclude that Petitioner's motives were analogous to those of Elias-Zacarias. Of course, the motives of the asylum seeker are relevant only to the extent that they illuminate the motives of the alleged persecutors.

The lesson of *Elias-Zacarias* is not that the United States Courts of Appeals should use that case as a yardstick of political motivation. Rather, *Elias-Zacarias* teaches that each case is fact dependent, and the Board's determination should be overturned only where the evidence presented by the petitioner is "so compelling that no reasonable fact finder could fail to find the requisite fear of persecution." *Elias-Zacarias,* 502 U.S. at 483483.

The deferential substantial evidence standard makes sense where, as here, the determination hinges on the motivations of the persecutors, who are not before the court, as illuminated by the motivations of the alien. Motivations are easily subject to reinterpretation and characterization upon recollection, and professions that a certain opinion motivated conduct are difficult to refute. Because the credibility of the asylum seeker is critically important, deference to the Board's determination is appropriate.

Petitioner argues that the Board's test — which requires him to show that his persecutors persecuted him because of his political opinion — is "unreasonably constricted and overly burdensome." Petitioner argues that an alien should be afforded more protection — not less — if he acts on his political opinions,

thereby incurring retaliation, rather than simply holding them close to his heart and causing no trouble for the opposition. However, this court's obligation is to enforce the law as written, not as it should be written. Congress has enumerated certain attributes which are protected. This list provides protection for individuals who are persecuted on account of their political opinion, but it does not include all individuals who are persecuted because their actions tend to obstruct the activities of politically-motivated organizations, even where those activities may be in part motivated by political opinion. The statute provides protection only where the past or anticipated persecution is on account of political opinion, regardless of whether the persecuted acts on that opinion; we are bound to follow that standard.

The Board's determination that Petitioner's persecution was not on account of his political opinion is supported by substantial evidence. Petitioner testified that he and his colleague were warned by the separatist terrorist organizations "every time we give [sic] names." (Joint Appendix 119). He testified that terrorists threatened him whenever soldiers went after the terrorists, indicating that he had informed the soldiers. "[T]hey thought we [sic] part of this process, we are informing the government, informing the soldiers. So they called us traitors or government informers at that time but we were only trying to protect." (Joint Appendix 122). Equally probative is the fact that Petitioner did not present evidence that the terrorists were targeting antiseparatists who were not serving as government informants; the evidence would support a conclusion, therefore, that it was his status as an informant, not his political opinion, that spurred their hatred. The terrorists focused their efforts on individuals they viewed as Traitors, those who were serving as government informants and thereby causing separatists to be killed by government forces.

*Appendix B*

For these reasons, the court determines that the Board's decision is supported by substantial evidence, and it shall be affirmed.

## IV.

Because the Board's determination is supported by substantial evidence, its ruling is AFFIRMED.

*Appendix B*

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting. The majority relies on the Supreme Court's recent decision in *INS v. Elias-Zacharias*, 502 U.S. 478 (1992), to support its conclusion that the petitioner, a former informant for pro-government Sri Lankan officials, does not have a "well-founded fear of persecution on account of . . . political opinion" entitling him to refugee status. Because I conclude that the facts of this case are easily distinguishable from those presented in *Elias-Zacharias*, and because Adhiyappa has shown with compelling evidence that he fears persecution on account of his political opinion, I must dissent.

In *Elias-Zacharias*, a Guatemalan citizen fled his homeland after guerrilla soldiers unsuccessfully tried to draft him into their rebel army. Although the Board of Immigration Appeals denied the petitioner refugee status, the Ninth Circuit reversed, finding that the petitioner had a well-founded fear of persecution based on his expressed political opinion of neutrality toward the guerrilla movement. 921 F.2d 844, 850 (9th Cir. 1990). The Supreme Court rejected this reasoning, however, finding insufficient evidence to establish that the guerrillas would persecute the petitioner "*because of* that political opinion, rather than because of his refusal to fight with them. " 502 U.S. at 483 (emphasis in original). Although the Court insisted that it was not requiring "direct proof of the alleged persecutors' motives, it found that to reverse the Board of Immigration Appeals's finding that the petitioner was ineligible for asylum, the petitioner would have to show proof of the alleged persecutor's motive "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution" based on political opinion. *Id.* at 483. On the facts before it, the Supreme Court believed that the petitioner failed to meet his burden of proving that the guerrillas' motive was to persecute him on account of his political opinion. The Court observed that:

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> Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons — fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias-Zacharias' part; it showed the opposite. He testified that he refused to joint the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacharias' refusal was politically based.

*Id.* at 482 (emphasis in original). Thus, the Court found insufficient evidence that the petitioner's refusal to fight was a manifestation of his political opinion, and that his political opinion was targeted for persecution.

In Adhiyappa's case, the Board of Immigration Appeals found that Adhiyappa feared persecution based on his activities as a government informant, not persecution based on his political opinion. The Board stated that "it is reasonable to assume that the retaliation would occur regardless of what political opinion, if any, the respondent held." The majority, too, seems to accept the proposition that Adhiyappa fears persecution based on his political activity, as contrasted to his political opinion. The majority uses *Elias-Zacharias* to support its view. However, the facts of that case and its ultimate holding readily distinguish it from the facts at hand.

*Appendix B*

*Elias-Zacharias* focused on the burden of proof necessary for a petitioner to show that any alleged persecution is based on the petitioner's political opinion. It demanded "some evidence, direct or circumstantial," of the persecutor's motive and, in a reversal of the Board, proof "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution" based on political opinion. 502 U.S. at 483. When an asylum-seeker has remained neutral and disassociated with any identifiable political faction, as did Elias-Zacharias, identification of the petitioner's political opinion is difficult. As the Supreme Court acknowledged in *Elias-Zacharias*, one might refuse to join a rebel military group for many reasons; often neutrality does not have a voice. When the petitioner's motive cannot be identified, proof of the persecutor's motive may be even more difficult. In cases involving petitioners who claim persecution based on their neutrality, therefore, the Court indicated that it will not assume that neutrality is a manifestation of a political opinion that is targeted for persecution.

This case, however, differs from those cases involving asylum-seekers who allege persecution based on their neutrality, but who have not displayed a clear political opinion that their persecutors attack. In this case, as the Board acknowledged, Adhiyappa was a member of the Ceylon Workers' Congress, a union which sought to help Indian Tamil Communities and which opposed a separate Tamil state in Sri Lanka. He testified that he and his family had always supported a unified Sri Lanka despite persecution of Indian Tamils by majority Sinhalese. In his position as a university professor, he articulated his antiseparatist politics and was actively engaged in the identification of Tamil terrorists, reporting them to progovernment university officials.

The majority claims that Adhiyappa's motives were unclear

and that he may have acted simply to keep his job. Under *Elias-Zacharias*, however, Adhiyappa's motives are irrelevant, except as they elucidate the motives of his alleged persecutors. Instead, it is the motives of the alleged persecutors that are pertinent. And here, the Tamil separatists made clear their intent to kill any who actively opposed their separatist movement by informing on them. The majority insists that 8 U.S.C.§ 1101 (a)(42)(A) gives refugee status to "individuals who are persecuted on account of their political opinion, but it does not include all individuals who are persecuted because their actions tend to obstruct the activities of politically-motivated organizations, even where those activities may be in part motivated by political opinion." But, it is difficult to see how persecutors can identify targets of persecution based on political opinion, except through political expression and activity. Unlike race, political opinion is perceived only by its expression. Thus, when acts such as those of Adhiyappa so clearly express a political opinion, persecution on account of those actions is persecution on account of political opinion.

Other cases reflect this reasoning. In a case decided after *Elias-Zacllarias*, the Second Circuit reversed the Board of Immigration Appeals's denial of refugee status to a Peruvian petitioner who had been a member of a municipal governing body and had spoken out against the "Shining Path," a communist guerrilla organization. *Sotelo-Aquije v. Slavery*, 17 F.3d 33 (2d Cir. 1994). As a result of his activity, the Shining Path had threatened to kill the petitioner unless he resigned his government position. The petitioner sought asylum in the United States, but the Board denied refuge status, reasoning that the Shining Path had threatened the petitioner because of his political position, not his political beliefs. The Second Circuit rejected that reasoning, insisting that the applicant "had a well-founded fear of

persecution on account of his acts and expressions of political opposition to tile Shining Path," *id.* at 37, given the fact that he had spoken out against the Shining Path and that only municipal leaders who opposed the Shining Path had been threatened with violence. With obvious evidence that the petitioner's expressions of political opinion had prompted reprisals, the court found the applicant eligible for asylum.

Similarly, in *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987), an El Salvadoran citizen requested asylum, claiming that he feared persecution based on his political opinion. The petitioner testified that after the government police saw him talking with a leftist university professor, the petitioner was kidnapped, imprisoned, and tortured because the police believed that he was involved with guerrilla politics. After his release, the petitioner illegally entered the United States, fearing further persecution. The Ninth Circuit interpreted the applicant's assertions of neutrality as expressions of a political opinion which had prompted government persecution. *Id.* at 1401. Since the date of that opinion, *Elias-Zachariar* has questioned whether a petitioner can prove persecution based on political opinion by asserting neutrality as the political opinion prompting reprisal. However, in *Turcios,* the petitioner's activities were more than mere manifestations of neutrality. Noting that Turcios had overtly discussed the government's intervention in university affairs with a leftist professor, and had demonstrated publicly, the court stated that "Turcios's actions constituted an expression of political opinions *Id.* It concluded that "[p]ersecution because of an overt manifestation of a political opinion is persecution because of a political opinion." *Id.* The level of proof in *Turcios*, I would submit, should easily satisfy the requirements of *Elias-Zacharias.*

*Appendix B*

The facts of this case are more analogous to *Turcios* and *Sotelo-Aquije* than to *Elias-Zacharias.* Adhiyappa clearly expressed a political opinion by informing on Tamil terrorists. The Tamil terrorists clearly expressed their intent to kill him if he did not cease his political activity. Certainly the fact that a close colleague was killed upon his return to Sri Lanka illustrates with compelling clarity that (the separatists seek to persecute those who actively oppose a separate state.

*Elias-Zacharias* demands that in order to reverse the Board's denial of refugee status, a petitioner for asylum must present compelling proof that the alleged persecutors seek to harm the petitioner because of his political opinion. Because I believe that the petitioner in this case has met this standard of proof, I respectfully dissent from the majority's conclusion that he should be denied asylum.

## APPENDIX C — DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED FEBRUARY 8, 1994

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

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File: A29 430 950 — Cincinnati

Date: FEB-8 1994

In re: THYAGARAJAH *ADHIYAPPA* a.k.a. Thiyagarajah Adhiyappa

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF
RESPONDENT:

Drew S. Diehl, Esquire
McKinney & Namei Co., L.P.A.
Suite 435 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202-3090

ON BEHALF OF SERVICE:

William A. Cassidy
General Attorney

CHARGE:

Order: Sec. 241(a)(4), I&N Act [8 U.S.C. § 1251(a)(4)] —
Crimes involving moral turpitude

APPLICATION: Asylum; withholding of deportation; remand

*Appendix C*

ORDER:

PER CURIAM. In a decision dated December 11, 1989, the immigration judge found the respondent deportable on the charge set forth above; denied his applications for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h); and denied his request for voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e). The respondent has appealed only from the denial of asylum and withholding of deportation. While the appeal was pending, the respondent filed a motion to remand for consideration of additional evidence in support of his applications for asylum and withholding of deportation. The motion to remand will be denied. The decision of the immigration judge is affirmed.

The respondent is a 39-year-old married, male native and citizen of Sri Lanka and a member of the Indian Tamil ethnic minority group.[1] He testified that he was a life-long member of the Ceylon Workers Congress (CWC), a group which sought to maintain the well-being of Indian Tamil communities. He stated that he and most Indian Tamils agreed with the CWC's position in favor of a united Sri Lanka and against a separate Tamil state in Sri Lanka. The respondent further advised that he grew up in the southern part of Sri Lanka, where most people belonged to the majority Sinhalese ethnic group. He said that he and his family

1. According to the United States Department of State's Bulletin on Sri Lanka and other background documents in the record, "Indian Tamils," who make up approximately 5.5 percent of the population of Sri Lanka, are relatively recent immigrants brought from India by British planters to work the coffee and tea estates in the central part of the country, while the "Sri Lankan Tamils," who comprise approximately 12.5 percent of the population of Sri Lanka, migrated to Sri Lanka from south India centuries ago.

suffered assaults and property damage in communal riots during 1960, 1977, 1979, and 1983 when Sinhalese attacked Indian Tamils even though they did not support the separatist aims of the other Tamils in Sri Lanka. He attributed much of the communal violence to a militant Sinhalese group called the Janatha Vimukthi Peramuna (JVP).

The respondent reported that in 1979, after his family's home was burned in rioting, he went to Vavuniya, in the northern part of Sri Lanka where most of the population belongs to the minority Tamil ethnic group. He said that he and two of his brothers became volunteers there on a collective farm run by Gandhiyam, a Tamil organization dedicated to Gandhi's principles of nonviolence. He stated that in late 1979 soldiers brought him and other workers from the farm to an army camp for questioning about the identity and location of leaders of militant Tamil separatist groups. The respondent testified that he and his co-workers were unable to provide any information about the militants. He related that when they returned to Gandhiyam, they discovered that the farm had been burned down.

The respondent stated that he next secured employment as an instructor in geography at Jaffna University in April 1980. He said that the university chancellor asked him to also serve in the capacity of student counselor, and he could not refuse the request because he did not want to lose his job. He explained that his duties in this position included advising freshmen, observing and possibly preventing terrorist activities on campus, and giving Sri Lankan security forces and campus authorities the names of students who were involved in such terrorist activities as robbing banks, breaking into stores, and recruiting other students for their movements. The respondent said that he informed on about 50 students during his time as student counselor. He stated that he

lived in a house with several other instructors and that every time soldiers took action against militants in the area, members of militant Tamil separatist groups such as the Liberation Tigers of Tamil Eelam (LTTE) and the Eelam People's Revolutionary Liberation Front (EPRLF) would come to the house. He explained that the militants called them traitors, assuming that he and the other instructors had been informing the government about them. The respondent related that the militants threatened to kill him if he continued to provide names to the authorities, but they never carried out the threat because the Government of Sri Lanka was still firmly in control of Jaffna at the time. He said that in August 1983, however, he left Jaffna because the government was losing control of the area to the militants.

The respondent testified that after leaving Jaffna, he came to the United States on a student visa. He advised that he obtained an exit visa from Sri Lanka and had no trouble leaving the country. He explained that he had no fear of the Government of Sri Lanka because the government has no inclination to punish Indian Tamils and does not seek them. The respondent asserted that he mostly feared the militant Tamil separatists in northern Sri Lanka. He added that he also could not live in the southern part of Sri Lanka because the JVP is operating there and has "terrorized" him since he was a child.

The respondent has not satisfied the well-founded fear standard of eligibility required for asylum under section 208 of the Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). He has not shown that a reasonable person in his circumstances would fear persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The respondent does not base his persecution claim on any fear of harm by the Government of Sri Lanka. He asserts that he mainly

fears Tamil militants, as they made threats against him over a decade ago for informing authorities about students involved in their movement. Yet the respondent has not established that any interest the Tamil militants might still have in him would be on account of his race, religion, nationality, membership in a particular social group, or political opinion. Their interest would appear to be for retaliation against a perceived informer, which would not be persecution on account of a protected status; it is reasonable to assume that the retaliation would occur regardless of what political opinion, if any, the respondent held.

The respondent has also failed to establish his claim based on the widespread communal violence in 1960, 1977, 1979, and 1983 in which he and his family suffered assaults and property damage. The violence and destruction which occurred at the time were exceptional and not the normal state of affairs in the southern part of Sri Lanka where the respondent resided. Moreover, the respondent attributes much of the problem to the JVP, but it has not been shown that the group is a viable threat any longer. *See Matter of T-*, Interim Decision 3187 (BIA 1992) at 5.

Finally, the respondent has not demonstrated a well-founded fear of persecution for one of the specified grounds as a result of the violent conditions in Sri Lanka. Conditions of political upheaval which affect the populace as a whole are insufficient to establish an alien's eligibility for asylum. *See Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985); *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982); *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985), *aff'd sub nom. Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility

required for withholding of deportation. *See Matter of Mogharrabi, supra.* The evidence does not establish that it is more likely than not that the respondent would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act. *See INS v. Stevic*, 467 U.S. 407 (1984).

We turn now to the respondent's motion to remand. In that motion, the respondent contends that since the immigration judge's decision in his case, "startling new evidence of the power and the wide range of [the] LTTE's operations has developed." He proceeds to list various political assassinations and other violent actions attributed to the LTTE since the immigration judge's December 1989 decision. In support of his motion, the respondent has attached numerous documents describing the activities of the LTTE.

The standards governing motions to reopen are applicable to motions to remand. *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987). A motion to reopen will not be granted unless a prima facie case of eligibility for the relief sought has been established. *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Wang*, 450 U.S. 139 (1981); *Matter of Martinez-Romero*, 18 I&N Dec. 75 (BIA 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979); *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972); *see Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972).

We find that remand to the immigration judge for consideration of the evidence submitted by the respondent with his motion is not warranted. While these documents reflect that the LTTE is indeed an active terrorist movement, they do not establish, prima facie, that the respondent has a well-founded fear of persecution for one of the five grounds specified in the Act. As discussed above, the LTTE's potential interest in the respondent

is for retaliation against him for informing the authorities about students engaged in its movement. Neither the evidence already in the record, nor the evidence submitted with the motion, indicate that the LTTE would have any interest in the respondent for one of the specified grounds.

Accordingly, the appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

s/ Fred W. Vacco
FOR THE BOARD

## APPENDIX D — ORAL DECISION OF THE IMMIGRATION JUDGE, DATED DECEMBER 11, 1989

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Chicago, Illinois

File No.: A 29 430 950

December 11, 1989

In the Matter of

THYAGARAJAH ADHIYAPPA

Respondent

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(4)

APPLICATIONS: Asylum, withholding of deportation, voluntary departure

ON BEHALF OF REPONDENT:
Richard Fleischer, Esquire

ON BEHALF OF SERVICE:
William Cassidy
Trial Attorney

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent at an earlier session of the hearing

admitted that he was not a citizen or a national of the United States, but a native and citizen of Sri Lanka. Those admissions were made on July 10, 1989. That he had entered the United States as a student August 27, 1983. And it has been established on April 14, 1987, respondent was convicted in Hamilton County, Ohio Municipal Court for the offense of theft and also on February 28, 1989, he was convicted again in Hamilton County, Ohio Municipal Court for the offense of theft.

Exhibits number 2 and 3 corroborate the allegations that were made in the Order to Show Cause concerning the convictions for theft and I find that the deportability has been established by evidence which is clear, convincing and unequivocal that respondent is deportable as charged pursuant to Section 241(a)(4) in that after entering he has been convicted of two crimes involving moral turpitude, that is theft. As relief from deportation the respondent requested asylum pursuant to Section 208 of the Act, withholding of deportation pursuant to Section 243(h) or voluntary departure.

At a hearing which was held again on July 10, 1989, I stated that the respondent is ineligible for voluntary departure pursuant to Section 244(e) because of the two convictions for theft and the requirement that the respondent be able to establish good moral character as that term is defined in Section 101(f). The respondent would be excludable from the United States pursuant to Section 212(a)(9) because of the two theft offenses and thus he could not establish good moral character which is requisite for Section 244(e).

I also find that the respondent has failed to meet the evidentiary burden of proof of establishing that it is more

likely than not that his life or freedom would be threatened in Sri Lanka because of any of the reasons specified in Section 243(h) of the Act. Thus, his request for withholding of deportation will be denied in that a clear probability of persecution has not been shown.

I also find that the respondent has failed to meet the lower evidentiary burden of proof of establishing that he has a well founded fear of persecution in Sri Lanka because of any reason which would enable him to meet the definition of a refugee as that term is defined within Section 101(a)(42)(A) of the Act. I find that the evidence offered by the applicant has not shown that a reasonable person in his circumstances would fear persecution under one of the five grounds enumerated in the Act.

The respondent is an Indian Tamal whose parents came from India. The respondent himself did not receive Sri Lanka citizenship until 1979. He testified as a child with other Tamals that he frequently experienced the results of communal riots which have taken place in Sri Lanka for the last two decades if not longer. Citing situations in which their home was looted once when his sister was raped and finally once when the house was burnt.

However, the respondent's fear of returning to Sri Lanka at this time is not based upon action by the Government, but his fear from Tamal separatist groups and also from what he said was one Singhalese group because of his political opinion which he has expressed while he taught school in Jaffna which is in the far north part of Sri Lanka. And his opposition to a separate Tamal state. And his role as an informant for three years when he was on the faculty at that university informing

on students who the respondent believed to be members of at least three Tamal organizations and identifying the possible participation and other signs of civil unrest to include robbing of banks and other forms of lawbreaking.

The respondent stated that his position became known because he was an instructor in a course of geo politics. That his position was questioned. That one time a student advised him in class that he should leave. That this was a position also once a rock was thrown his window with an indication that it had been thrown by the Tamal Tigers. The respondent testified to the fact that the respondent's activity occurred in the northern portion of the country which is Jaffna which is one of the provinces the respondent had indicated has a majority Tamal population.

However, it is noted that the respondent is not from that province. He originates in the central part of the country. Also however, from a population that does have a Tamal majority. The respondent stated that he feels that he would be a terrorist target in Jaffna in the area he said he would have to return to and/or any other parts of Sri Lanka because of the small size of the country, the information that the terrorist organization knows.

Yet the respondent's presentation in this area was not corroborated by evidence to support his conclusions that the terrorist organization have a threatening presence in all areas in which he could find a place to live. It's evidenced by the respondent's background documentation, that he offers with his asylum application, there has been much in depth coverage of the civil strife in that country in the last two decades. Thus the activity of these terrorist organizations and the areas in which the respondent stated that he may have to live and the

extent of the danger that they could pose would have been easy to obtain.

The respondent in a case and we'll be examining the case for withholding of deportation pursuant to Section 243(h) and/ or asylum has the burden of proof and the respondent's conclusions in this area simply were not corroborated by evidence which would readily have been available. Respondent stated that he could not locate or talk to his mother. But he indicated he only tried to call her last night. The respondent offered a couple of articles from professors in politics but these are not specific to the issues that were raised by the respondent. That is to the immediate danger of the fear that he had on returning as opposed to the fear that somebody would have living in a country which had been consumed by civil strife for some period of time.

The respondent does have a political opinion. Political opinion that certainly that someone would take issue in Sri Lanka. It's an issue that's been discussed in that country for years whether or not there should be a separate Tamal area or state and how the two populations work together. However, the respondent has not provided evidence that this position, this is his political opinion, is the concern of anybody at this time. Particularly in light of the recent accords as to whether or not there should or should not be a separate state.

It's noted that there is still civil unrest in Sri Lanka and there probably will be for a long time. But respondent in order to indicate that he has a fear must show that there is a persecutor who would be aware of what his opinion is and that that persecutor has the capability of punishing him and the inclination to do so. The respondent stated that the area in which he lives in has a majority Tamal population. However,

it's noted that the terrorist groups the respondent referred to do not seem to be operating heavily in that area. At least the respondent has not offered evidence to establish such.

Accordingly, I find the respondent by failure to offer this evidence which I feel is readily available if in fact the fear exists, has failed to establish the burden of proof in either of his applications. Accordingly, the following orders will be entered.

ORDER

IT IS ORDERED that the respondent's application for asylum pursuant to Section 208 of the Act be denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of deportation pursuant to Section 243(h) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure pursuant to Section 244(e) of the Act be denied. The respondent shall be ordered deported to from the United States to Sri Lanka on the charge contained in the Order to Show Cause.

s/ Thomas Pullen
THOMAS PULLEN
Immigration Judge

Supreme Court, U.S.
FILED
FEB 12 1996
CLERK

No. 95-929

# In the Supreme Court of the United States

OCTOBER TERM, 1995

THIYAGARAJAH ADHIYAPPA, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

## QUESTION PRESENTED

Whether the decision of the Board of Immigration Appeals that petitioner's fear of persecution by a terrorist organization was not "on account of * * * political opinion" was supported by substantial evidence.

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# In the Supreme Court of the United States

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No. 95-929

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*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 58 F.3d 261. The decisions of the Board of Immigration Appeals (Pet. App. 25a-31a) and the immigration judge (Pet. App. 32a-37a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 28, 1995, and rehearing was denied on September 13, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on December 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined in that Section as any person who has left his native country and is unable or unwilling to return there "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42).

2. Petitioner is a member of the Indian Tamil ethnic group, which has been involved in a protracted conflict between political, religious, cultural, and ethnic factions within Sri Lanka. The main competing groups in the Sri Lankan conflict are the Sinhalese, who comprise the majority of the population, and the Sri Lankan Tamils, who migrated to Sri Lanka from southern India many centuries ago. Indian Tamils, a small group of relatively recent immigrants brought to Sri Lanka by the British to serve as agricultural laborers, are "exploited and ignored" members of Sri Lankan society, and are "the untouchables of Sri Lanka." Pet. App. 5a.[1]

A major source of conflict between the competing factions is the proposal that a separate Tamil state be

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[1] Although petitioner testified that he and his family suffered violent assaults and property damage by Sinhalese forces, he has expressly waived any claim to asylum based upon a fear of persecution by the Sinhalese. Pet. C.A. Br. 3 n.3. Accordingly, petitioner's recitation of facts relating to alleged attacks by the Sinhalese is not relevant to the issues before the Court. See Pet. 4-5.

created within Sri Lanka. Sri Lankan Tamils generally favor that proposal, while Sinhalese and Indian Tamils generally oppose it. Pet. App. 5a. Certain militant Tamils have sought to advance the separatist cause through acts of terrorism. *Id.* at 27a-28a. Petitioner strongly opposes the creation of a separate Tamil state. *Id.* at 5a.

In September 1980, petitioner was hired as a geography instructor by Jaffna University in northern Sri Lanka. In March 1981, the chancellor of the university asked him to serve as an assistant student advisor, and he accepted the position. Petitioner's duties included advising freshman students, and observing and preventing terrorist activities on campus. As required by his job, petitioner provided the names of students suspected of participating in terrorist activities to Sri Lankan security forces and to campus authorities. Pet. App. 6a, 27a.

Petitioner testified that, as a student advisor, he informed on about 50 students. Pet. App. 27a. He claimed that each time government soldiers took action against militants in the area, he received threats from Tamil separatist groups that suspected him of informing on their members. *Id.* at 28a. He testified that, although the militants called him a traitor and threatened to kill him if he continued to inform on them, he did not heed their warnings because he was afraid that he might lose his job: "They [the terrorists] said if you continue to do that, we will kill you. But having no choice, I had to hold on to my job, I had to report to the university as well [as to] security forces." *Id.* at 16a. He added that he felt somewhat protected from the militants because the government was still firmly in control of Jaffna. By

mid-1983, however, the government's control over Jaffna began to erode, and petitioner fled Sri Lanka, fearing that his life was in danger. *Id.* at 28a.

3. Petitioner entered the United States in August 1983, on a non-immigrant student visa. He was convicted of theft offenses on April 14, 1987, and on February 28, 1989. In light of those convictions, the Immigration and Naturalization Service (INS) brought deportation proceedings against petitioner pursuant to former Section 241(a)(4) of the Immigration and Nationality Act (Act), 8 U.S.C. 1251(a)(4) (1988), which authorizes the Attorney General to deport any alien who, at any time after entry into the United States, is convicted of two or more crimes involving moral turpitude.[2] Petitioner conceded his deportability, but requested asylum pursuant to 8 U.S.C. 1158(a) and withholding of deportation pursuant to 8 U.S.C. 1253(h). Pet. App. 7a-8a.

In an oral decision issued on December 11, 1989, the immigration judge (IJ) found that petitioner was statutorily ineligible for asylum and withholding of deportation. Pet. App. 32a-37a. The IJ found that petitioner was opposed to the creation of a separate

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[2] Although Section 2 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, renumbered and in some instances revised the grounds for deportation, Section 602(d) of the 1990 Act (104 Stat. 5067) specified that those changes would not apply to "deportation proceedings for which notice has been provided to the alien before March 1, 1991." In any event, the same provision is now found at Section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. 1251(a)(2)(A)(ii) ("Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.").

Tamil state, but concluded that petitioner had failed to demonstrate a well-founded fear of persecution on account of that political opinion. *Id.* at 34a. The IJ based his conclusion, in part, on a finding that petitioner had failed to prove that "the terrorist organization[s] have a threatening presence in all areas in which he could find a place to live." *Id.* at 35a. The IJ also cited a lack of evidence that petitioner's political opinion was "the concern of anybody at this time." *Id.* at 36a. Accordingly, the IJ ordered petitioner deported to Sri Lanka.

The BIA affirmed the decision of the immigration judge. Pet. App. 25a-31a. The BIA observed that petitioner "mainly fears Tamil militants, as they made threats against him over a decade ago for informing authorities about students involved in their movement." *Id.* at 28a-29a. It determined, however, that the evidence did not support petitioner's fear of persecution on account of political opinion, or any other ground specified in 8 U.S.C. 1158(a). Pet. App. 28a-29a. The BIA concluded that the militants' "interest would appear to be for retaliation against a perceived informer, which would not be persecution on account of a protected status; it is reasonable to assume that the retaliation would occur regardless of what political opinion, if any, [petitioner] held." *Id.* at 29a.

Petitioner sought review of the deportation order in the United States Court of Appeals for the Sixth Circuit. The court of appeals sustained the BIA's decision, concluding that it was supported by substantial evidence. Pet. App. 3a-24a.

## ARGUMENT

The court of appeals' determination that the BIA's findings were supported by substantial evidence is fact-bound and does not conflict with any decision of this Court or of any other court of appeals. Thus, further review is unwarranted.

1. Petitioner argues that the court of appeals has unreasonably restricted asylum eligibility to cases in which the persecutor is motivated "exclusively by the applicant's political thought, and not to any degree by actions which the applicant has taken against the persecutor's interest." Pet. 11. That argument, however, mischaracterizes the decision below. The court of appeals did not address the issue of how an asylum claim should be treated where the alleged persecutor acts on the basis of mixed motives, some of which might be "on account of" the applicant's political opinion. Instead, the court upheld the BIA's determination that the terrorists who threatened petitioner did *not* act on account of any political opinion of petitioner, but rather acted on the basis of a retaliatory motive. Pet. App. 17a. That conclusion was based on evidence that the militant separatist organizations "warned" petitioner every time he "[gave] names," and threatened him "whenever soldiers went after the terrorists, indicating that [they believed that] he had informed the soldiers." *Ibid.* In addition, the court noted that "[p]etitioner did not present evidence that the terrorists were targeting antiseparatists who were not serving as government informants." *Ibid.* Thus, the BIA's determination "that it was [petitioner's] status as an informant, not his political opinion, that spurred [the

militants'] hatred," *ibid.*, was supported by substantial evidence.

The result reached by the Sixth Circuit is consistent with this Court's decision in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). In *Elias-Zacarias*, the Court reversed a Ninth Circuit decision holding that the BIA erred in rejecting a Guatemalan native's political asylum claim, which was based on evidence that he was threatened with forcible conscription into a guerrilla army. The Court observed that an asylum applicant must "provide *some* evidence of [the persecutor's political motive]," because the asylum statute "makes motive critical." *Id.* at 483. The Court also noted that, to obtain reversal of an adverse BIA decision, it is not enough for the applicant to point to evidence supporting his claim of a well-founded fear of politically-motivated persecution: "[H]e must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484. Applying that deferential standard of review, the Court concluded that the evidence did not compel the conclusion that the guerrillas' attempt to conscript Elias-Zacarias constituted persecution "on account of * * * political opinion," because the guerrillas might have attributed his reluctance to fight to a multitude of nonpolitical factors, such as a "fear of combat" or a desire to remain with his family. *Id.* at 482.

In this case, as in *Elias-Zacarias*, the threatened persecution was not necessarily on account of petitioner's political opinion because, as noted above, substantial evidence supports the BIA's finding that the terrorist threats against petitioner's life were

motivated by his activities as an informant.[3] Although petitioner's assertion that the terrorists had some political motives may be plausible based on the evidence presented, the BIA's findings must be sustained absent evidence "so compelling that no reasonable factfinder could fail to find" that the militants' threats were politically motivated. *Elias-Zacarias*, 502 U.S. at 484; see *id.* at 481 n.1 ("[t]o reverse the BIA finding we must find that the evidence not only *supports* [petitioner's] conclusion, but *compels* it"); *American Textiles Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 523 (1982) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence") (quoting *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)). In this case, the evidence simply did not permit reversal under the deferential standard set forth in *Elias-Zacarias*.

3. In attempting to demonstrate a "major conflict" among the circuits, petitioner catalogues cases in which courts have rejected the Board's finding that persecution was not "on account of * * * political

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[3] Petitioner attempts to distinguish *Elias-Zacarias* on the ground that the asylum applicant there was an uneducated peasant who wished to remain politically neutral, whereas petitioner is a university instructor who had openly expressed his anti-separatist political views. Pet. 17-18. However, in *Elias-Zacarias*, the Court expressly declined to decide whether the applicant's political neutrality qualified as a political opinion, 502 U.S. at 483, and instead decided the case based on the lack of compelling proof of the *persecutors'* political motivation.

opinion." Pet. 19-22. However, each of the cases cited by petitioner is distinguishable from the Sixth Circuit's decision here, which presents a textbook application of the principles enunciated in *Elias-Zacarias*.

For example, in *Osorio* v. *INS*, 18 F.3d 1017 (1994) (see Pet. 20), the Second Circuit held that the BIA erroneously presumed that a union activist's dispute with the government could not have a political dimension because it occurred in the context of an economic dispute. By so presuming, the court held, the BIA improperly discounted evidence of the persecutor's mixed motives, which appeared to be political as well as economic. 18 F.3d at 1029-1031; accord *Singh* v. *Ilchert*, 801 F. Supp. 313, 319 (N.D. Cal. 1992). The instant case, however, has no relation to "mixed motive" cases such as *Osorio* and *Singh*, because the BIA reasonably found that petitioner failed to establish that the militants had any concern about his political opinions. See Pet. App. 17a.

Likewise, *Sotelo-Aquije* v. *Slattery*, 17 F.3d 33 (2d Cir. 1994) (see Pet. 20-21), is distinguishable from this case. In *Sotelo-Aquije*, the Second Circuit reversed the BIA's decision that a municipal council member failed to prove a well-founded fear of persecution by a guerrilla organization. The council member's claim was based on evidence that the guerrillas threatened to harm him if he refused to resign from his post. The BIA had held that the guerrillas targeted the petitioner because of his status as a council member, not because of his political beliefs. 17 F.3d at 37-38. The Second Circuit set aside the BIA's holding as unsupported by substantial evidence, noting that the holding was contradicted by the BIA's own factual finding that only those council members who actively

opposed the guerrilla group became targets of its violence. *Id.* at 37.

Here, petitioner, like other Indian Tamils, had publicly advocated a unified Sri Lanka long before he became an informant, apparently without provoking threats from the terrorists. Indeed, he was a member of the Ceylon Workers' Congress, which strongly opposes the formation of a separate Tamil state. Pet. App. 21a. Thus, unlike in *Sotelo-Aquije*, nothing in the record contradicted the BIA's finding that it was petitioner's status as an informant, not his political opinion, that caused him to be singled out for persecution.

Finally, *Rivas-Martinez* v. *INS*, 997 F.2d 1143 (5th Cir. 1993), and *Perkovic* v. *INS*, 33 F.3d 615 (6th Cir. 1994) (Pet. 19-22), are not inconsistent with the court of appeals' holding in this case. In *Rivas-Martinez*, the Fifth Circuit held that the BIA erred in denying a Salvadoran woman's claim that she had a well-founded fear of political persecution, based on her refusal to assist a guerrilla organization. 997 F.2d at 1145-1146. The sole basis for the BIA's decision was that the petitioner had never communicated her political views directly to her persecutors; instead, she had offered a "non-political * * * excuse" for her refusal to assist the guerrillas, "in an effort to avoid * * * antagonizing" them. *Id.* at 1147. The Fifth Circuit held that remand was necessary because the BIA had not made a factual finding about the guerrillas' motivation for persecuting the petitioner, which could have been on account of her political beliefs despite her attempt to hide those beliefs. *Id.* at 1146. In contrast, the BIA explicitly found in the instant case that the militant Tamils were not motivated by their disagreement with petitioner's political beliefs, but instead were

interested in petitioner only because he was a perceived informer. Pet. App. 29a.

*Perkovic* v. *INS*, 33 F.3d 615 (6th Cir. 1994), is also inapposite. In *Perkovic*, the petitioners demonstrated that they had a well-founded fear that they would be persecuted if they returned to Yugoslavia because they had been active in promoting civil rights there for ethnic Albanians. One of the petitioners had been arrested, beaten, and interrogated about his political activities, which had included public display of the Albanian flag and of pro-Albanian posters. *Id.* at 616-617. His sister, the other petitioner, had been arrested after police found an Albanian flag and cassette recordings of Albanian ethnic music in her room. *Id.* at 617. The evidence presented in *Perkovic* clearly established that the petitioners were targeted on account of their political opinion. Here, however, petitioner did not present any evidence that he was interrogated or threatened due to his political opinion; instead, the threats against petitioner's life followed confrontations about his activities as an informant. In any event, any tension between the Sixth Circuit's decision in this case and its prior decision in *Perkovic* would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Far from demonstrating "a profound confusion about what this Court enunciated in *INS* v. *Elias-Zacarias*" (Pet. 23), the cases cited by petitioner show that the lower courts uniformly have required the BIA to consider evidence of the persecutor's motivation when evaluating whether threatened persecution is "on account of * * * political opinion." In the instant case, the Sixth Circuit denied relief because the evidence petitioner presented

did not justify reversal under the deferential standard of review required by *Elias-Zacarias*, not because of any legal controversy over the definition of "refugee."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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